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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL VARGAS, Defendant and Appellant.	G054998 (Super. Ct. No. 15CF1254) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheri T. Pham, Judge. Affirmed.

Lindsey M. Ball, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, Arlene A. Sevidal and Kristen Ramirez, Deputy Attorneys General, for Plaintiff and Respondent.

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Rafael Vargas was convicted of attempted second degree robbery and sentenced to formal probation for three years. He appeals, arguing the prosecutor engaged in prejudicial misconduct during closing argument. Specifically, Vargas complains it was improper for the prosecutor to tell the jury that his claim of severe intoxication at the time of the alleged robbery, causing him to black out and not remember anything, was not a defense to the charge.

We find no misconduct. The prosecutor's argument to the jury was consistent with the law precluding the defense of unconsciousness in cases such as this, where the defendant's claimed intoxication was voluntary. Although Vargas could have relied on this claim to suggest his intention during the incident had been to do something other than commit a robbery, he could not rely on it to support an argument that he lacked capacity to form any conscious intent and thus had none at all. Instead, as the prosecutor correctly pointed out, Vargas's asserted inability to recall the attempted robbery, even if true, was ineffective to undermine the evidence suggesting that his intention at the time had been to rob his victim.

Vargas also contends the trial court erred by allowing the prosecution to elicit what he characterizes as speculative and inflammatory opinion testimony from the victim regarding gangs. However, the challenged testimony was minimal and not particularly inflammatory, and we consequently conclude that even assuming there was error, it would have provided no basis for reversing the judgment.

Finally, Vargas contends the trial court erred by imposing unreasonably broad probation conditions restricting his freedom of association and travel. As we will discuss, we find these issues have become moot.

FACTS

Vargas's conviction arose out of an incident occurring at approximately 2:00 a.m. on June 7, 2015. His victim, Miguel Vargas (Miguel),[1] was walking home from his car following a trip to a Taco Bell, carrying a bag of food.

Miguel noticed Vargas running nearby, accompanied by another young man on a bicycle. Vargas then left his companion and approached Miguel alone, blocking his path. As he was approaching, Vargas asked Miguel if he "banged," and Miguel said no. Vargas identified a gang he claimed to be from, although his words were slurred and Miguel could not make out the name of the gang. Vargas's reference to gang membership made Miguel nervous because Miguel was not part of a gang.

Vargas then asked Miguel to give him his bag of food, and Miguel refused. Vargas had one of his hands in the pocket of his shorts, beneath his shirt, and he positioned it to look like a gun pointing at Miguel. He then said to Miguel, while ostensibly pointing his gun: "Give me all your shit or I'll blast you."

At that point, Miguel "kind of blanked" from fear. He could not initially tell whether what was under Vargas's shirt was really a gun, but he soon realized it was not. After a moment, Miguel came to his senses and again refused to give Vargas anything.

Vargas then told Miguel that if he did not turn over all of his belongings, Vargas would "call his homey." That also scared Miguel, but he continued to refuse, and

[1] Because Vargas shares a last name with his victim, we refer to the latter by his first name solely for the sake of clarity. No disrespect is intended.

Vargas began "pleading" and made attempts to reach into Miguel's pockets, where Miguel had his keys, wallet and cell phone. Miguel continued to say "no."

A nearby police officer observed the unfolding confrontation from his patrol car, beginning at a point when Miguel's hands were "up in the air" and Vargas had both hands in Miguel's pockets. The officer intervened, and then detained Vargas in the back seat of his patrol car. The officer stated he could not get a statement from Vargas because he appeared to be heavily intoxicated. He later observed some vomit in the car near Vargas and asked him if he was "okay."

Vargas was charged with an attempted robbery in the second degree (Pen. Code, §§ 211, 212.5, subd. (c) & 664, subd. (a)),[2] and the case went to trial. At the beginning of trial, Vargas moved, in limine, to exclude "any evidence regarding gangs, or more specifically Myrtle Street gang," pursuant to Evidence Code section 352. He argued the evidence was unduly prejudicial because Vargas was not a gang member.

The prosecutor responded by arguing the court should admit the evidence that Vargas had told Miguel he was from a gang on Myrtle Street, to show the effect that statement had on Miguel's state of mind during the confrontation. The court agreed with the prosecutor and ruled she would be allowed to elicit testimony from Miguel about Vargas's purported statement that he would call his "homeys from Myrtle."

Vargas testified at trial, explaining that before the alleged robbery, he had spent much of the day and evening drinking heavily at a friend's house. Vargas stated that the last thing he remembered from the day was drinking with his friends sometime in the evening. He did not remember leaving his friend's house. Vargas's next memory was when he woke up the following morning at the police station, feeling confused, scared, and hungover.

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[2] All further statutory references are to the Penal Code, unless otherwise indicated.

The jury convicted Vargas of attempted second degree robbery. The court sentenced him to the time he had previously served in county jail, plus three years of formal probation with various conditions. The conditions of probation included that Vargas "maintain residence as approved by your probation officer" and that he "not associate with persons known to you to be parolees, on post-release community supervision, convicted felons, users or sellers of illegal drugs, or otherwise disapproved of by your probation officer." Vargas did not object to those probation conditions when they were imposed.

DISCUSSION

1. *Prosecutorial Misconduct*

Vargas first contends his conviction must be reversed because the prosecutor engaged in prejudicial misconduct during her rebuttal closing argument. We conclude the challenged comments were consistent with the law applicable to voluntary intoxication, and thus did not amount to misconduct.

The prosecutor's comments came in response to a point made by Vargas's counsel in his own closing argument. Vargas's counsel had focused on Vargas's intoxication at the time he confronted Miguel, arguing Vargas could not have intended to commit a robbery because "[h]e was so drunk that he was unconscious and not aware of his actions." In support of this argument, counsel pointed out that Vargas "couldn't even recall what he was doing that day," and that Vargas had testified "it wouldn't have been his intent to rob [Miguel because] he's not that type of guy."

In her rebuttal, the prosecutor dismissed the significance of Vargas's claim of unconsciousness: "Conveniently, the one thing in this case that they're putting at issue, the intent, that I don't remember anything, yet I know I didn't intend to rob him. It's ridiculous. [¶] And it's not a defense that he doesn't remember what happened. Even if you believe what he testified to today, he's still guilty. If you believe that he doesn't

remember, that's not a defense. That he doesn't remember the next day, that he doesn't remember today, two years later, it's not a defense that he blacked out."

At that point, Vargas's counsel objected, pointing out the prosecutor was "[b]urden shifting." The court overruled the objection, and the prosecutor continued: "It's not a defense that he threw up. He had to have been so impaired on the day of the crime, at the time of the crime, that he could not have formed the intent. [¶] And actions speak louder than words. Miguel knew exactly what he was intending. The officer driving by said that's suspicious. That looks like a robbery. The officer knew what he was intending."

Vargas contends those rebuttal comments improperly undermined "the defense in [his] case—that he was so drunk he had blacked out to a state of unconsciousness." He asserts that such evidence of unconsciousness "rebuts the usual presumption of consciousness" and "raises doubt as to whether he can form the required intent."

Vargas's argument fails. As explained in *People v. Reyes* (1997) 52 Cal.App.4th 975, 982, "[t]he diminished capacity defense, which addressed an accused's 'general capacity or ability to form a specific intent or harbor a mental element of an offense,' was abolished in 1982. [Citations.] Thus, evidence of voluntary intoxication or mental disorders may no longer be used as an affirmative defense to a crime."

What remains is the legal concept commonly referred to as "diminished actuality." Vargas's assertion of unconsciousness as a defense is directly inconsistent with Penal Code section 29.4, subdivision (a), which states "[e]vidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including . . . intent." (Section 29.4, subd. (a).) Such evidence "is admissible solely on the issue of whether or not the defendant actually formed a required specific intent." (Section 29.4, subd. (b); see *People v. Saille* (1991) 54 Cal.3d 1103,

1120, ["the defendant's evidence of intoxication . . . is proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt. In such a case the defendant is attempting to relate his evidence of intoxication to an element of the crime"].)

In this case, the evidence suggested Vargas acted with some intention—he did not act accidentally or inadvertently when he pointed his simulated gun at Miguel and demanded his food and other belongings. An obvious inference is that Vargas's intent was to permanently deprive Miguel of that property.

Vargas might have relied on his claimed intoxication to argue against that inference; he might have suggested that his intention in accosting Miguel had been something else: e.g., "I was so drunk I thought it would be funny to pretend I had a gun and scare that guy with the Taco Bell bag." (See *People v. Flores* (1936) 15 Cal.App.2d 58, 67 ["the jury may take into consideration the fact that the accused was intoxicated *at the time*, in determining the purpose, motive or intent with which he committed the act"].)

But as the prosecutor pointed out, Vargas claimed no alternative intent. Rather, he asserted he had no memory whatsoever of the incident because he had been intoxicated and blacked out. The prosecutor then properly argued that Vargas's inability to remember what happened, even if true, was not a defense to the charge, and it was also ineffective to rebut the strong inference that Vargas had intended to permanently deprive Miguel of his property when he accosted him. In fact, the prosecutor specifically zeroed in on the inconsistency inherent in Vargas's assertion, which she summarized as, "I don't remember anything, yet I know I didn't intend to rob him." Judging by its verdict, the

jury resolved this question of fact as to Vargas's actual intent at the time of the incident against him. We find nothing improper in the prosecutor's argument.[3]

In any event, even if we assumed the argument had the potential to confuse the jury as to the burden of proof—and we draw no such conclusion—Vargas has failed to demonstrate that "'"[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner."'" (*People v. Cortez* (2016) 63 Cal.4th 101, 130 (*Cortez*).) "If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.'" (*Ibid*.)

In this case, the trial court instructed the jury on the elements of robbery, making clear it was the prosecutor's burden to prove each of those elements, including that Vargas had acted with the intent to deprive Miguel of his property permanently, beyond a reasonable doubt. Additionally, the court instructed the jury that it could consider the evidence of Vargas's voluntary intoxication in deciding whether he had acted with the required intent for the crime of robbery, while reiterating in that same instruction that the prosecutor had the burden of proving intent. We presume the jury followed those instructions (*People v. Boyette* (2002) 29 Cal.4th 381, 435-436), and thus

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[3] Vargas's additional assertion, that it could not have been his intent to commit a robbery because "he's not that type of guy," added nothing to his claimed inability to remember. That claim has been made, and rejected, for at least a century. "'A sane man who voluntarily drinks and becomes intoxicated is not excused because the result is to cloud his judgment, unbalance his reason, impair his perceptions, derange his mental faculties, and lead him to the commission of an act which in his sober senses he would have avoided.'" (*People v. Goodrum* (1916) 31 Cal.App. 430, 434.)

would not likely have been misled by any arguably inconsistent assertions in the prosecutor's rebuttal.[4]

2. Error in Allowing Victim to Testify Regarding Gangs

Vargas also contends the trial court prejudicially erred by allowing the prosecutor to ask Miguel questions regarding gangs, despite its earlier in limine ruling limiting such testimony. Specifically, Vargas challenges an exchange involving three questions and three answers—two of which were stricken.

The prosecutor first asked Miguel why he became nervous when Vargas asked him if he were in a gang. He responded "Because I'm not part of a gang. So that means he has a group of friends or other people that will come, that could aid him in anything he wants to do, really." Vargas's counsel objected to the response on the ground it was speculative and moved to strike it. The court sustained the objection and struck everything after "Because I'm not part of a gang."

The prosecutor then asked Miguel if he was "familiar with gangs," and he responded that he was because he had lived around gangs his entire life. The prosecutor asked Miguel, "What does a gang mean to you?" He replied, "A bunch of people that aren't doing good things [¶] . . . I believe if it was anything, it would be they use fear to intimidate others." Vargas's counsel again objected, and the court again sustained the objection and struck the testimony.

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[4] Rather than acknowledging the clear instructions allocating the burden of proof to the prosecutor, Vargas suggests the jury instructions were inadequate to dispel any potential confusion on the issue because they did not include a specific instruction "speak[ing] to the effect of blacking out and the prosecution's burden of proving [he] was conscious of his behavior." He also notes there was no instruction "address[ing] the effect of blacking out to the point of unconsciousness on the ability to form specific intent." However, as we have explained, a defendant cannot rely on his voluntary intoxication as a basis for negating his capacity to form an intent.

Finally, the prosecutor again asked Miguel "what is a gang to you?" He responded, "Just people grouped together for whatever cause." Although Vargas's counsel again objected to that answer, the court overruled that objection.

Vargas now argues "[t]he entire subject-matter of gangs was inflammatory and suggestive and should have been more explicitly excluded during the *in limine* proceedings." He also suggests that Miguel's comments regarding gangs amounted to inadmissible lay opinion testimony.

However, such evidence, even assuming it were improperly admitted—a conclusion we do not reach—would support a reversal of the judgment only if there was a "reasonable probability that the trial court's error in permitting [it] affected the jury's verdict." (*People v. Champion* (1995) 9 Cal.4th 879, 923, overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860; see *People v. Watson* (1956) 46 Cal.2d 818, 836.) We conclude there was no such probability here.

The only testimony the court admitted was Miguel's third answer, in which he stated that gangs were "[j]ust people grouped together for whatever cause." It is difficult to conceive of a more benign description of a gang. Further, given the undisputed evidence of what Vargas said and did during his confrontation with Miguel, it is inconceivable to us that Miguel's testimony about gangs—including the stricken portions of his testimony—had any material impact on the jury's view of that incident. We therefore reject the assertion that the trial court prejudicially erred by allowing Miguel to briefly testify about gangs.

3. Improper Probation Conditions

On our own motion we take judicial notice of a Superior Court register of actions in this case dated February 28, 2018, which indicates that Vargas's probation was

terminated on that date when he was found in violation and sentenced to state prison.[5] Before doing so, we gave notice to the parties and provided them with an opportunity to object. We also invited them to inspect the register of actions and file supplemental letter briefs addressing whether that termination renders Vargas's appeal of the probation terms moot. We have considered the parties' letter briefs as we decide this appeal.

"It is a fundamental principle of appellate practice that an appeal will not be entertained unless it presents a justiciable issue." (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1489.) """[A]s a general rule it is not within the function of the court to act upon or decide a moot question or speculative, theoretical or abstract question or proposition, or a purely academic question, or to give an advisory opinion on such a question or proposition."" (*Id.* at p. 1490.) As a general rule, the termination of a defendant's probation renders an appeal challenging probation conditions moot. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120, fn. 5.)

Since Vargas is no longer on probation, he cannot benefit from the portion of his appeal challenging any term of that probation. That portion of his appeal therefore has become moot.[6]

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[5] Evidence Code sections 452, subdivision (d), and 459, subdivision (a); *People v. White* (2014) 223 Cal.App.4th 512, 519-520, fn. 4.

[6] Vargas in his letter brief asks us to decide this issue notwithstanding its mootness. We decline to do so as we find the issues raised are not "'capable of repetition yet likely to evade review.'" (*Williams v. Superior Court* (2014) 230 Cal.App.4th 636, 654, disapproved on other grounds in *People v. DeLeon* (2017) 3 Cal.5th 640, 653.)

DISPOSITION

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.